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IN THE SUPREME COURT OF MISSOURI

Case No. SC86937

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TERRI JO HEMME and TERRY HEMME  
Appellants,

vs.

SAM BHARTI, KUSUM BHARTI and BHARTI MIDWAY  
PROPERTIES, INC.

and

R.J. REYNOLDS TOBACCO COMPANY  
Respondents.

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Appeal From the Circuit Court of Lafayette County,  
State of Missouri  
Division 1  
The Honorable Dennis A. Rolf, Circuit Judge

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SUBSTITUTE BRIEF OF RESPONDENT

**R.J. REYNOLDS TOBACCO COMPANY**

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## **STATEMENT OF FACTS**

Respondent/Defendant R.J. Reynolds Tobacco Company provides a separate statement of facts to set forth those facts that are material to the legal questions presented by this appeal.

This is the second of two lawsuits stemming from a vehicular accident that occurred on February 8, 1998. (L.F., pp. 23-26, pp. 47) In the first lawsuit, Plaintiff Deborah Harrison alleged that Defendant Terri Jo Hemme was negligent in the operation of her motor vehicle when she pulled out of the Bharti Liquor Store parking lot onto Highway 13, striking Ms. Harrison's motor vehicle (traveling on Highway 13) in the process. (L.F., p. 24, p. 47). Defendants Sam Bharti and Kusum Bharti were owners of the Bharti Liquor Store while Defendant Bharti Midway Property Company was the operator. (L.F., pp. 28-29). These three Defendants ("the Bharti Defendants") were brought into that first lawsuit because Ms. Harrison claimed that the Bharti defendants acted negligently in allowing a Doral cigarette sign to be placed on their property or in maintaining the Doral cigarette sign on their property in such a way as to block the vision of motorists exiting the property. (L.F., pp. 28-29). Specifically, Ms. Harrison claimed that a Doral sign present on the Bharti Liquor store parking lot on the day of the accident blocked Defendant Terri Jo Hemme's vision as she exited the lot, thereby causing or contributing to the accident at issue. (L.F., pp. 28-29). Ms. Harrison also named R.J. Reynolds Tobacco Company (hereinafter "R.J.R.") as a Defendant, claiming that that R.J.R. placed the subject Doral sign on the Bharti parking lot in an allegedly unsafe location and consequently in a allegedly negligent manner and that R.J.R. had a duty to monitor and check on the Doral sign to ensure

that it did not block the vision of exiting motorists. (L.F., p. 24, pp. 28-29). R.J.R. brought cross-claims for contribution against Terri Jo Hemme and the Bharti Defendants and Terri Jo Hemme and the Bharti Defendants brought cross-claims for contribution against R.J.R. (L.F., pp. 23-25, p. 47). All five defendants settled out with Plaintiff in that first lawsuit. (L.F., p. 26, p. 47). All claims brought by Plaintiff against the five defendants were dismissed with prejudice. (L.F., p. 26, p. 47).

After the first lawsuit had been completely resolved, Terri Jo Hemme, a defendant in the first lawsuit, brought this action. (L.F., pp. 6-13, p. 29, pp. 32-33, p. 47). In this action, Terri Jo Hemme, now Plaintiff, seeks damages for alleged injuries she sustained as a result of the February 8, 1998 vehicular accident. (L.F., pp. 6-13). Ms. Hemme's husband, Terry Hemme, also brings a claim for loss of consortium. (L.F., pp. 6-13). Defendant R.J.R. and the Bharti defendants brought forward nearly identical motions for summary judgment arguing Plaintiffs' claims were barred by both the compulsory counterclaim rule and the doctrine of *res judicata*. (L.F., pp. 23-44). Plaintiffs responded by arguing Rule 55.32, the compulsory counterclaim rule, only applied to counterclaims and not cross-claims. (L.F., pp. 45-54). Lafayette County Judge Dennis Rolf disagreed with plaintiffs and granted summary judgment in favor of R.J.R. and the Bharti defendants. (L.F., p. 66). On July 28, 2005, the Missouri Court of Appeals for the Western District issued its written opinion affirming Judge Rolf's ruling granting summary judgment in favor of R.J.R. and the Bharti defendants. In addition, the Missouri Court of Appeals for the Western District transferred this matter to this Court pursuant to Rule 83.02 "because of the general interest or importance of a question involved in the case for the purpose of reexamining existing law."

## **POINTS RELIED ON**

I. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN R.J.R.'S FAVOR BECAUSE R.J.R. IS ENTITLED TO JUDGMENT AS A MATTER OF LAW FOR THE REASON BEING THAT PLAINTIFFS' CLAIMS ARE BARRED BY THE COMPULSORY COUNTERCLAIM RULE BECAUSE TERRI JO HEMME WAS REQUIRED TO BRING THE CLAIMS FOR PERSONAL INJURY CONTAINED IN THIS ACTION AGAINST R.J.R. IN DEBORAH HARRISON V. TERRI JO HEMME AND SAM BHARTI AND KUSUM BHARTI AND MIDWAY PROPERTIES, INC. AND R.J. REYNOLDS TOBACCO COMPANY GIVEN THAT BOTH ACTIONS HINGE UPON THE SAME OCCURRENCE, NAMELY, THE FEBRUARY 8, 1998 VEHICULAR ACCIDENT.

Evergreen National Corporation v. Killian Construction Co., 876 S.W.2d 633 (Mo.App.1994)(abrogated on other grounds)

Joel Bianco Kawasaki Plus, et al. v. Meremac Valley Bank, 81 S.W.3d 528 (Mo. banc. 2002)

Jones v. Corcoran, 625 S.W.2d 173 (Mo. App. 1981)

Stevinson v. Deffenbaugh Industries, Inc., 870 S.W.2d 851 (Mo. App.1993)

## **ARGUMENT**

THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN R.J.R.'S FAVOR BECAUSE R.J.R. IS ENTITLED TO JUDGMENT AS A MATTER OF LAW FOR THE REASON BEING THAT PLAINTIFFS' CLAIMS ARE BARRED BY THE COMPULSORY COUNTERCLAIM RULE BECAUSE TERRI JO HEMME WAS REQUIRED TO BRING THE CLAIMS FOR PERSONAL INJURY CONTAINED IN THIS ACTION AGAINST R.J.R. IN DEBORAH HARRISON V. TERRI JO HEMME AND SAM BHARTI AND KUSUM BHARTI AND MIDWAY PROPERTIES, INC. AND R.J. REYNOLDS TOBACCO COMPANY GIVEN THAT BOTH ACTIONS HINGE UPON THE SAME OCCURRENCE, NAMELY, THE FEBRUARY 8, 1998 VEHICULAR ACCIDENT.

### **Standard of Review**

The appellate courts review *de novo* the trial court's granting of summary judgment. Chiney v. American Drug Stores, Inc., 21 S.W.3d 14, 16 (Mo. App. 2000).

Rule 55.32(a), more commonly known as the compulsory counterclaim rule, reads as follows:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any

opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Missouri courts have repeatedly recognized that the clear purpose of Rule 55.32 and its predecessors is "to serve as 'a means of bringing all logically related claims into a single litigation, through the *penalty of precluding the later assertion of omitted claims.*' " Joel Bianco Kawasaki Plus, et al. v. Meremac Valley Bank, 81 S.W.3d 528, 532 (Mo. banc. 2002) *citing* State ex rel. J.E. Dunn, Jr. & Associates, Inc. v. Schoenlaub, 668 S.W.2d 72, 75 (Mo. banc. 1984), *quoting*, Cantrell v. City of Caruthersville, 221 S.W.2d 471, 474 (1949)(emphasis added). This is analogous to the basis for the doctrine of *res judicata*. Bianco, 81 S.W.3d at 532. For this reason, the Missouri Supreme Court has often spoken of the underpinnings of the compulsory counterclaim rule utilizing terms usually associated with *res judicata*, noting that a particular claim was "barred" by the failure to assert it as a counterclaim. Id.

The compulsory counterclaim rule is simply the codification of the principles of *res judicata* and collateral estoppel. Id. Claims and issues which could have been litigated in a prior adjudicated action are precluded in a later action between the same parties or those in privity with them. Id.

The transaction element of the compulsory counterclaim rule is to be "applied 'in its broadest sense,' to encompass all claims connected by a



logical nexus." Evergreen National Corporation v. Killian Construction Co., 876 S.W.2d 633, 635 (Mo. App. 1994) (abrogated on other grounds).

The term is one of broad and flexible meaning and is intended to include all the facts and circumstances constituting the foundation of a claim. Stevinson v. Deffenbaugh Industries, Inc., 870 S.W.2d 851, 857 (Mo. App. 1993). In applying Rule 55.32(a), it is not necessary that the opposing claims be conditional upon each other, nor is the rule limited to those claims that are of the same nature or seek the same relief. Id at 856.

In Jones v. Corcoran, 625 S.W.2d 173 (Mo.App.1981), the underlying lawsuit was one for personal injury and wrongful death resulting from a three vehicle collision. The plaintiffs joined Jones, a truck driver, Jones' employer, Wynne, a truck driver, and Wynn's employer. Jones and his employer filed cross-claims for indemnity or apportionment of fault against Wynn and his employer under Whitehead. Jones then filed a separate cross-claim against Wynn and his employer for personal injured sustained in the accident. The Plaintiffs moved to sever Jones' cross-claim for personal injury. The trial court granted the motion for severance and a preliminary writ followed. The appellate court stated that under Whitehead, when Jones and his employer filed cross-claims for apportionment of fault against Wynn and his employer, they became opposing parties, **"triggering the provisions of 55.32(a)"** **Those provisions make the Jones' personal injury claim a compulsory counterclaim.** Jones, 625 S.W.2d at 174. (emphasis added). See also Miller v. LHKM, 751 P.2d 1356, 1359-1361 (Ala. 1988) (holding that when one defendant asserts a cross-claim against another defendant, they

become opposing parties for purposes of the compulsory counterclaim rule) *citing* Mohr v. State Bank of Stanley, 734 P.2d 1071 (Kan.1987); Jorge Construction Co. v. Weigel Excavating and Grading Company Corp., 343 N.W.2d 439, 443 (Iowa. 1984) (co-parties are not opposing parties *until* one of them files a cross-claim against the other) (italics added); Ecker v. Clark, 428 S.W.2d 620, 621 (Ken. App. 1968) (when one defendant asserts a cross-claim for contribution or indemnity against another defendant, they become opposing parties for purposes of the compulsory counterclaim rule); Colhouer v. Union Pacific Railroad Company, 551 P.2d 1291, 1293 (Or.banc.1976)(when one defendant asserts a cross-claim against another defendant, the doctrine of *res judicata* applies); In re Tony Aguilar v. Valley Federal Savings Bank, 95 B.R. 208, 209 (N.M. Bank. 1989) (holding that when one defendant asserts a cross-claim against another defendant, they become opposing parties for purposes of the compulsory counterclaim rule under Federal Rules of Civil Procedure 13); Joel Bianco Kawasaki Plus, et al. v. Meremac Valley Bank, 81 S.W.3d 528, 533 (Mo. banc. 2002) *citing* Kolb v. Scherer Brothers Financial Services Co., 6 F.3d 542, 545 (8<sup>th</sup> Cir.1993)(a co-defendant cannot avoid the compulsory counterclaim rule by stating his action against another defendant was a permissive cross-claim as opposed to compulsory).

Turning to the case at hand, Plaintiff Terri Jo Hemme here was defendant Terri Jo Hemme in the case styled Deborah Harrison v. Terri Jo Hemme and Sam Bharti and Kusum Bharti and Midway Properties, Inc. and R.J. Reynolds Tobacco Company, Lafayette case number CV198290CC. (L.F., pp. 6-13, p. 24, p. 29, pp. 32-33, p. 47). In that action, Deborah Harrison filed suit against Terri Jo Hemme for alleged injuries she sustained as a result of a vehicular accident that occurred on

February 6, 1998. (L.F., pp. 23-24, pp. 28-29, p. 47). Deborah Harrison alleged that Terri Jo Hemme was negligent in the operation of her motor vehicle when she “pulled out of a drive way of a business onto Missouri Highway 13 and struck the Plaintiff’s vehicle . . . Plaintiff was driving on Highway 13.” (L.F., pp. 23-24, pp. 28-29, p. 47). Eventually, four more defendants were added to that lawsuit: Sam Bharti, Kusum Bharti, Midway Properties, Inc. and R.J. Reynolds Tobacco Company. (L.F., pp. 23-24, p. 47). However, throughout all of the amended pleadings, the crux of Deborah Harrion’s lawsuit remained the same. Deborah Harrison’s third and final Amended Petition alleged that Terri Jo Hemme was negligent in the operation of her motor vehicle when she “pulled out of a driveway of a business onto Missouri Highway 13 and struck the Plaintiff’s vehicle . . . Plaintiff was driving on Highway 13.” (L.F., p. 24, pp. 28-29, p. 47).

On May 21, 2002, R.J.R. filed a cross-claim against Terri Jo Hemme (and the other defendants) seeking contribution from Terri Jo Hemme. (L.F., pp. 23-25, pp. 28-29, p. 47).

On May 23, 2002, Terri Jo Hemme filed a cross-claim against R.J.R. (and the other defendants) seeking contribution from R.J.R. with respect to Deborah Harrison’s claims. (L.F., pp. 23-25, pp. 28-29, p. 47). Terri Jo Hemme did not seek damages for injuries she may have sustained as a result of the February 6, 1998 accident, as she does here in the action presently before the Court. (L.F., p. 26, pp. 28-29, p. 47).

All five defendants settled out with Deborah Harrison in the case styled Deborah Harrison v. Terri Jo Hemme and Sam Bharti and Kusum Bharti and Midway Properties, Inc. and R.J. Reynolds Tobacco Company, Lafayette case number CV198290CC. (L.F., p. 26, pp. 28-29, p. 47). All claims in that case were dismissed with prejudice. (L.F., p. 26, pp. 28-29,

p. 47). Terri Jo Hemme now brings claims against R.J.R. in the action at hand for alleged injuries she suffered as a result of the February 6, 1998 lawsuit that was the subject of Deborah Harrison v. Terri Jo Hemme and Sam Bharti and Kusum Bharti and Midway Properties, Inc. and R.J. Reynolds Tobacco Company, Lafayette case number CV198290CC. (L.F., pp. 6-13, pp. 24-26, p. 29, p. 33, p. 47). Under the compulsory counterclaim rule, her claims are barred. Terri Jo Hemme should have brought the claims for personal injury contained in this action against R.J.R. in Deborah Harrison v. Terri Jo Hemme and Sam Bharti and Kusum Bharti and Midway Properties, Inc. and R.J. Reynolds Tobacco Company. She did not. (L.F., p. 12, p. 47). The penalty for not doing so under Rule 55.32(a) is that her claims are now barred. Joel Bianco Kawasaki Plus, et al. v. Meremac Valley Bank, 81 S.W.3d 528, 532 (Mo. banc. 2002) *citing* State ex rel. J.E. Dunn, Jr. & Associates, Inc. v. Schoenlaub, 668 S.W.2d 72, 75 (Mo. banc. 1984), *quoting*, Cantrell v. City of Caruthersville, 221 S.W.2d 471, 474 (1949).

Plaintiffs argue the compulsory counterclaim rule never applies to cross-claims. This argument misses the point. Once R.J.R. filed a cross-claim against Terri Jo Hemme in Deborah Harrison v. Terri Jo Hemme and Sam Bharti and Kusum Bharti and Midway Properties, Inc. and R.J. Reynolds Tobacco Company, they become opposing parties for purposes of the compulsory counterclaim rule. Jones, 625 S.W.2d at 174. Once R.J.R. brought its claim for contribution against Terri Jo Hemme, R.J.R. became the cross-claim plaintiff and Terri Jo Hemme became the cross-claim defendant. It was no different than if R.J.R. had sued Terri Jo Hemme in a separate and independent action. Once R.J.R. and Terri Jo Hemme became opposing parties, Ms. Hemme was required to assert as a counterclaim any

claim she had against R.J.R. “arising out of the transaction or occurrence” that was the subject matter of R.J.R.’s claim for contribution. There is no dispute that the subject matter of R.J.R.’s claim for contribution was the February 6, 1998 vehicular accident involving Deborah Harrison and Terri Jo Hemme. As such, Terri Jo Hemme was required to bring her claims for personal injury contained in this lawsuit against R.J.R. in the case of Deborah Harrison v. Terri Jo Hemme and Sam Bharti and Kusum Bharti and Midway Properties, Inc. and R.J. Reynolds Tobacco Company. Because she did not, her claims are now barred.

Plaintiffs cite Jacobs v. Corley, 732 S.W.2d 910, 914 (Mo.App.1987) for the proposition that cross-claims are always permissive. As succinctly stated by the Western District, “the authority cited by Jacobs does not support its conclusion.” Terri Jo Hemme, et al. v. Sam Bharti, et al., 2005 WL 1510220 at 5. The holding in Brown v. Harrison, 637 S.W.2d 145, 148 (Mo.App.1982), the case primarily relied upon by the Jacobs court, holds that the severing a cross-claim of a co-defendant leaves the co-defendants in the trial of the plaintiff’s claims as though the cross-claim was never brought. Brown, 637 S.W.2d at 148. This unique procedural history did not arise in Jacobs, or in Jones or in this matter. In other words, the holding of Brown was specific to the procedural facts of that case.

Lastly, in an effort to avoid application of the compulsory counterclaim rule and the resulting bar of their claims, Plaintiffs ask the Court to pronounce its decision in this case as applying prospectively as opposed to retroactively. In making this plea, Plaintiffs erroneously assume that a decision by this Court in favor of R.J.R. would constitute a change to existing procedural law. This is not the case. The current version of Rule 55.32(a) first became effective on January 1, 1994. The predecessor of

Rule 55.32(a) dates back to 1943, with the passage of V.A.M.S. § 509.420. The phrase “any opposing party” went unchanged in the compulsory counterclaim rule from 1943 to the present time. The Court in Jones and the Western District in this matter did not create new law in holding that the filing of a cross-claim activates the compulsory counterclaim rule. Rather, they enforced a rule that has been on the books in Missouri since 1943.

### **CONCLUSION**

As the trial court and the Missouri Court of Appeals for the Western District correctly ruled, Terri Jo Hemme should have brought the claims contained in this action against R.J.R. in Deborah Harrison v. Terri Jo Hemme and Sam Bharti and Kusum Bharti and Midway Properties, Inc. and R.J. Reynolds Tobacco Company. Because she did not, under the compulsory counterclaim rule, plaintiffs’ claims are now barred. Defendant R.J. Reynolds Tobacco Company respectfully requests the Court to affirm the trial court’s judgment granting summary judgment in its favor on all claims contained in Plaintiffs’ Petition.

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## **CERTIFICATE OF COMPLIANCE AND SERVICE**

COMES NOW, the undersigned attorney for Respondent R.J. Reynolds Tobacco Company, on this 25<sup>th</sup> day of July, 2005 and hereby certifies pursuant to Rule 84.06(c) the following:

1. This brief includes the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. This brief contains 3,311 words and 363 lines according to statistics compiled by the Microsoft Word program.
4. Pursuant to Rule 84.06(g), a Microsoft Word file containing this Brief is being submitted on a floppy disk, which has been scanned for viruses and is virus-free.
5. Two (2) copies of this brief have been sent via United States mail, postage prepaid, to the following:

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